SUPREME COURT, U. S.

FILED

SEP 22 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-269

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DECATURVILLE SPORTSWEAR COMPANY, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

CHARLES HAMPTON WHITE
W. OVID COLLINS, JR.
CORNELIUS, COLLINS, HIGGINS & WHITE
Eighteenth Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorneys for the Respondents

St. Louis Law Printing Co., Inc., 818 Olive Street 63101 314/621-4477

INDEX

	Page
Opinions Below	1
Question Presented	2
Introduction	2
Statement of the Case	3
Argument	5
The Court of Appeals applied the correct standard in reviewing the findings, conclusions, and recommendations of the Special Master and correctly determined that the Company was not shown by clear and convincing evidence to have violated its decree; accordingly, the writ should be denied	5
Conclusion	10

CITATIONS

Cases

Decaturville Sportswear Company, Inc. v. NLRB, 406 F. 2d 886 (6th Cir. 1969)	2
Marlene Industries Corporation, 166 NLRB 703 (1967)	2
Marlene Industries Corporation, 171 NLRB 848 (1968)	2
NLRB v. Local 5881, United Mine Workers of America, 323 F.2d 853 (6th Cir. 1963)	5
NLRB v. Adam Loos Boiler Works Co., 435 F.2d 707 (6th Cir. 1970)	9

NLRB v. Lynair, Inc., 380 F.2d 286 (6th Cir. 1967) ... 5
NLRB v. Warren Co., 350 U.S. 107 (1955) 5, 6, 7, 8, 9
NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967) 9
Sylco Corporation, 184 NLRB 741 (1970) 3
Union Tool Co. v. Wilson, 259 U.S. 107 (1922) 7

Statute

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.)
Section 8(a)(1) 2, 4
Section 8(a)(3) 2, 4
Section 8(a)(5) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. .....

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DECATURVILLE SPORTSWEAR COMPANY, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Decaturville Sportswear Co., Inc. et al. [subsequently referred to as "the Company"], oppose the Petition for a Writ of Certiorari in this cause because the United States Court of Appeals for the Sixth Circuit correctly determined the question presented and there is no compelling reason why its decision should be reviewed by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported. The findings and conclusions of the Special Master, which were adopted by the Court of Appeals, are set out in two memoranda and are reproduced in the appendix to the petition for certiorari.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the Petitioner failed to establish a violation of its decree by clear and convincing evidence.

INTRODUCTION

This proceeding represents the third major confrontation between the International Ladies' Garment Workers' Union, AFL-CIO [subsequently called "the Union"], and Marlene Industries Corporation and its wholly owned subsidiaries [hereinafter referred to as "the Company"] to organize the Company employees. As outlined in the first proceeding, *Marlene Industries Corporation*, 166 NLRB 703 (1967), enforced in part in *Decaturville Sportswear Company, Inc. v. NLRB*, 406 F.2d 886 (6th Cir. 1969), the Union began its organizing campaign at the Company's plants in Tennessee, South Carolina, and Alabama in May, 1965, over ten years ago.

In the second encounter, the Union demanded recognition at both the Trousdale Manufacturing Co., Inc., and Westmoreland Manufacturing Corporation plants in Tennessee in March and April, 1966. Recognition was declined, and the National Labor Relations Board issued a complaint charging the Company with the unlawful discharge of three employees, interrogation and threats to another, and an unlawful refusal to recognize and bargain with the Union, all in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended [subsequently referred to as "the Act"]. This case, *Marlene Industries Corporation*, 171 NLRB 848 (1968) was tried before the same trial examiner who recommended that the complaint be dismissed in its entirety since he found that the Company had committed no unfair labor practices. His recommended order

was adopted by the National Labor Relations Board, without modification, in May, 1968.

The Union has asked for only one election at a Company plant, Slyco Corporation at Sylva, North Carolina. This occurred in 1968. In August, 1970, the National Labor Relations Board certified that the Union was defeated in that election contest. *Sylco Corporation*, 184 NLRB 741 (1970).

STATEMENT OF THE CASE

It is against this background of a continuing organizing campaign that the evidence considered by the Special Master and Court of Appeals must be considered. The Union has continued its organizing campaign from May, 1965, through July 15, 1970, at all of the Company's plants embraced by the decree of the Court of Appeals except at Decaturville where picketing began on June 23, 1970. Since most of the evidence considered by the Special Master and Court of Appeals concerned allegations regarding events at Decaturville, a brief recital of what the Special Master found to have occurred at this plant is in order.

On June 23, 1970, a presser, Nelson Rushing, was discharged by plant manager, Lloyd Anderson, because of Rushing's refusal to come to the plant manager's office to discuss a production problem. Some fifty-odd pressers in the pressing department refused to return to work unless the Company rescinded its discharge of Rushing. When the Company declined, the pressers walked out in protest of Rushing's discharge and began picketing the plant. The Special Master concluded that the Company's discharge of Rushing was not an unfair labor practice nor did it violate the decree of the Court of Appeals. [Pet. App. 36a, 48a, 49a]. The Court of Appeals concurred

[Pet. App. 2a, 4a]. Additionally, the Special Master concluded that the pressers who walked out to protest the lawful discharge of Rushing were not engaged in a protected concerted activity, and, therefore, that the company did not violate Section 8(a)(1) or (3) of the Act or the decree of the Court of Appeals when it discharged them for refusing to return to work [Pet App. 38a, 49a]. On the other hand, the June 24, 1970, letter of the Company offering reinstatement to all pressers except Rushing was found by the Special Master and the Court of Appeals to be a valid offer of reinstatment; and, therefore, no unfair labor practice or violation of the decree of the Court of Appeals occurred in connection with the Company's treatment of the Decaturville pressers [Pet. App. 2a, 3a, 49a].

After the picketing commenced at Decaturville, on orders of the Union, it spread on July 15, 1970, to the other Company plants at Hartsville, Tennessee, Westmoreland, Tennessee, Loris and Aynor, South Carolina, and Frisco City, Alabama [Pet. App. 42a, 44a].

Having heard the evidence, the Special Master concluded that the National Labor Relations Board failed to establish by clear and convincing evidence that the picketing at Loris or Frisco was to protest unfair labor practices [Pet. App. 73a]. Since the strikers at both Loris and Frisco were economic strikers, the Special Master concluded that the Company did not violate the Act nor the decree of the Court of Appeals when the employees were not immediately reinstated upon their request to return to work [Pet. App. 73a]. The Court of Appeals adopted this conclusion [Pet. App. 3a].

ARGUMENT

The Court of Appeals Applied the Correct Standard in Reviewing the Findings, Conclusions, and Recommendations of the Special Master and Correctly Determined That the Company Was Not Shown by Clear and Convincing Evidence to Have Violated Its Decree; Accordingly, the Writ Should Be Denied.

The Court of Appeals held:

> "To hold Respondents in civil contempt we must find clear and convincing evidence in the record which proves that Respondents have violated a judgment of this Court. *NLRB v. Lynair, Inc.*, 380 F.2d 286 (6th Cir. 1967), *NLRB v. Local 5881, United Mine Workers of America*, 323 F.2d 853 (6th Cir. 1963)."
>
> "A review of the record of this case, including the exceptions to the Special Master's report, and the briefs filed in support of those exceptions fails to convince this Court that the Special Master's findings which were based on two years of fact finding were clearly erroneous." [Pet. App. 3a].

The reason assigned by the Solicitor General for this Court to grant the writ is an asserted conflict between the quoted test of the Court of Appeals and the test of this Court enunciated in *NLRB v. Warren Co.*, 350 U.S. 107 (1955).

The Special Master concluded that "employee Nelson Rushing was insubordinate and, accordingly, was discharged for just cause . . ." [Pet. App. 48a]. He also concluded that "the remaining pressers were not justified in their demands that Rushing be reinstated or rehired by plant manager Anderson on June 23, 1970, before they would return to work. These pressers were not discharged by the Company unreasonably under the

circumstances, ..." [Pet. App. 49a]. In overruling the objections of the National Labor Relations Board to these findings and conclusions of the Special Master, the Court of Appeals stated emphatically that the mere mentioning by the Special Master of impermissible motives as having possibly played some role in the dismissal of Rushing and the pressers "hardly rises to the level of clear and convincing evidence of impermissible dismissals justifying a finding of civil contempt." [Pet. App. 4a]. It is at this point in the Court of Appeals' opinion that the language appears which the Board finds so abhorent:

> "A contempt proceeding is a setting very different from a normal proceeding for the enforcement of a Board order. The burden imposed by the clear and convincing evidence standard is heavy. The Board has *failed* to demonstrate that the Special Master erred in his finding or conclusions." [Pet. App. 4a]. (Emphasis supplied).

We submit that the test utilized by the Court of Appeals is entirely consistent with the decision of this Court in *Warren Co.* Of course, *Warren Co.* does not stand alone but must be taken in the context of its factual setting. There the employer failed to bargain with the Union since it demanded proof that the Union continued to represent a majority of the employees in the bargaining unit. This demand for proof of majority status came after the Board had determined such majority existed, and the Court of Appeals had enforced a bargaining order of the Board. Then, the Board filed a petition in the Court of Appeals, specifically setting forth the conduct of the employer in failing and refusing to comply with the Court's decree and asking that the employer be required to show cause why it should not be held in contempt. In its answer to the contempt petition, the employer admitted: (1) that there was sufficient evidence, even though disputed, to support the Board's order; and (2) that it had refused to bargain with the Union because of a loss in majority status due to a turnover in personnel.

Having made these two admissions before the Court of Appeals, the question for decision was limited to one issue: whether an employer who has been found guilty by the Board of unfair labor practices in refusing to bargain with a union "designated as the exclusive representative of its employees and who has been directed to so bargain, is, after a decree enforcing the order and without remedying its unfair labor practices, legally justified in refusing to bargain with the Union because it contends the Union does not in fact have majority status in its plant, or must such employer bargain fairly for a reasonable length of time in accordance with the order to avoid an adjudication in civil contempt." 350 U.S. at 112. This Court held in *Warren Co.* that under such circumstances, an employer cannot lawfully refuse to bargain; that he must do so for a reasonable time; and that a failure to do so invokes a statutory duty on the part of the Court of Appeals, on petition of the Board, to adjudicate the employer in contempt of its decree. While the Board is correct in asserting that the National Labor Relations Act contemplates "cooperation" between the Board and the Court of Appeals both at the enforcement and contempt stages in order to effectuate its purposes, we submit that the Board is clearly wrong in assuming that the Courts of Appeal were meant to be a statutory rubber stamp for what the Board conceives to be a violation of the Court's decree. We suggest that this is truly the issue here as the Board is clearly attempting to limit the authority of the Court of Appeals to review its own decree and to determine whether or not a violation of the decree has occurred.

This Court has made it clear that the granting or withholding of remedial action is not wholly discretionary with the Courts of Appeal in certain instances. The facts presented in *Warren Co.* are an example of one of these situations. In *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922), cited in footnote 6 of this Court's opinion in *Warren Co.*, Mr. Justice Brandeis, discussing the scope of remedial orders in contempt proceedings, observed:

> "But the fact that a remedial order was entered in a contempt proceeding is not, in itself, a reason why it should not be subject to correction by an appellate court. . . . In the determination of the question whether an injunction has been violated, and, if so, whether compensation shall be made to the injured party, there may be occasion for the exercise of judicial discretion; but the order to be entered in such a proceeding is not exclusively or necessarily a discretionary one. . . . Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." 259 U.S. at 112.

An objective reading of the decision of the Court of Appeals here will clearly indicate that the Court of Appeals did not abuse its discretion in withholding remedial action. In fact, the Court of Appeals acted in complete conformity with the rationale of *Warren Co.* Here, the Court of Appeals did not refuse to extend well-settled principles of law to a conceded state of facts. In *Warren Co.* the employer in its answer to the petition for contempt alleged:

> "As shown hereinbefore and hereinafter Respondent has refused to bargain collectively with the Union because it did not represent a majority of the employees." 35 U.S. at 111.

Thus, there was not question of fact to be resolved in *Warren Co.* and the only issue presented to the Court was what remedy should be ordered to redress an admitted violation of the decree. Here after two years of fact finding, the Special Master found the facts adverse to the National Labor Relations Board and the Board was unable to convince the Court of Appeals on objections to the Special Master's report that the findings of fact were clearly erroneous. The National Labor Relations Board seeks to treat the present case as a conceded set of facts to

which it would apply well-settled rules of law; however, we submit that this is obviously not the case since the Court of Appeals properly applied the clearly erroneous rule to facts that were found adversely to the Board so as to make a determination of whether or not its decree had in fact been violated.

Contrary to the assertions of the Solicitor General, the denial of the contempt sanction by the Court of Appeals here does not subvert the enforcement of the National Labor Relations Act. What the Special Master's findings and the Court of Appeals decision clearly reflect is the total failure by the Board to sustain its burden of proof where and when it counted, before the Special Master. That the Company may have had dominant motives, mixed motives, equal motives, concurrent motives, or a bewildering combination of these is not the important or critical issue since it must be remembered that the act itself prohibits discrimination, and that the focus of dominant motivation is only a test to reveal whether discrimination has in fact occurred. *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576 (5th Cir. 1967); *NLRB v. Adam Loos Boiler Works Co.*, 435 F.2d 707 (6th Cir. 1970). While it may not be necessary for the Board to show dominant motives, it is necessary for the Board to show some motive and the Court of Appeals simply determined that the Board had failed to offer clear and convincing evidence that the discharge of Rushing and the other pressers was unlawful or justified a finding of civil contempt [Pet. App. 4a]. The Board apparently suggests that the existence of a previous anti-union animous is sufficient and that a Court of Appeals should blindly confirm the Board's conclusion of a violation of the Court of Appeals decree. Such a test, we submit, is clearly not the standard enunciated by this Court in *Warren Co.* and is clearly not a standard consistent with the policies of the National Labor Relations Act.

CONCLUSION

For the reasons assigned, the Company respectfully urges that the writ be denied.

Respectfully submitted

CHARLES HAMPTON WHITE

W. OVID COLLINS, JR.
CORNELIUS, COLLINS, HIGGINS
& WHITE
Eighteenth Floor
Third National Bank Building
Nashville, Tennessee 37219
Attorneys for the Respondents